

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2084

To be argued by:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEONARD FAMBO,

Petitioner-Appellant,

v.

HAROLD J. SMITH, Superintendent, Attica
Correctional Facility,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE

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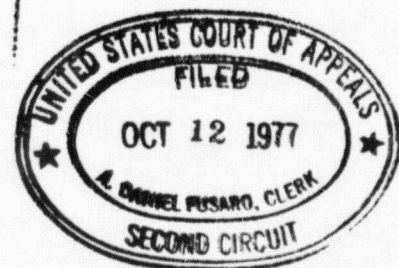


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Preliminary Statement

This is an appeal from an order of the United States District Court for the Western District of New York (John T. Curtin, Ch. J.), dismissing Leonard Fambo's petition for a writ of habeas corpus. Fambo pled guilty to a charge of possession of an incendiary device under former New York Penal Law Section 205.05(1) (a class D felony); in satisfaction of an indictment charging two

separate counts of possession of explosive substance under former New York Penal Law 265.05(7) (a class B felony).

The prosecutor failed to disclose to the defense that at the time of the second count in the indictments the explosive substance had been replaced with sawdust. The undisclosed information had no bearing on the first charge.

Chief Judge Curtin found that the undisclosed information had no effect on the voluntariness of the plea and therefore denied the petition.

Questions Presented

1. Whether the undisclosed information that the maximum possible sentence was forty and not fifty years invalidates petitioner's accepting a plea with a five year sentence?

2. Whether the prosecutor had a duty to disclose information which did not raise a reasonable doubt as to guilt?

Statement of Facts

Petitioner Leonard Fambo and two co-defendants were indicted by an Onondaga County, New York, Grand Jury on two

counts of possession of dynamite with the intent to use the same unlawfully against the person or property of another in violation of former Section 265.05(7) of the New York Penal Law. Count I charged possession of "a stick of dynamite containing powder and nitroglycerin. . ." on or about November 29, 1970 and Count II charged "possession of a stick of dynamite containing powder and nitroglycerin. . ." on or about December 1, 1970. (JA70) At that time Section 265.05(7) of the New York Penal Law was a Class B Felony which carried with it possible punishment of twenty-five years in prison.

On October 27, 1972, Leonard Fambo pleaded guilty to a reduced charge of possession of an incendiary device in violation of former Section 265.05(1) of the Penal Law in satisfaction of both counts of the Indictment. (JA73) At that time Section 265.05(1) was a Class D felony carrying with it a possible maximum punishment of seven years in prison. Mr. Fambo was promised, however, that his "sentence will not exceed five years if you enter this plea." (JA73)

The plea was the result of a pre-trial conference between defense counsel, prosecutor, and the Court. Following the conference, defendant and defense counsel conferred at length and accepted the plea (JA72-74).

The sole basis of the petition for a writ of habeas corpus is that the prosecutor had failed to disclose certain information to the defense prior to the plea. The undisclosed information is that the police had removed the explosives from the stick of dynamite on November 29 and subsequently replaced them with sawdust. (JA68, 39-44).

The undisclosed information had no bearing on the first count of the indictment. (JA29) It did, however, raise the possibility of a defense of factual impossibility to the second count. Such a defense would not have precluded a conviction for attempted possession (JA30).

The District Court castigated the prosecutor for failing to disclose the information but nonetheless found that the failure did not prejudice the petitioner (JA28, 32-33).

POINT I

THE UNDISCLOSED INFORMATION THAT
THE MAXIMUM POSSIBLE SENTENCE WAS
FORTY NOT FIFTY YEARS DOES NOT
INVALIDATE PETITIONER'S ACCEPTING
A PLEA WITH A FIVE YEAR SENTENCE.

Plea bargaining has been expressly recognized as "an essential component of the administration of justice." Santobello v. New York, 404 U.S. 257, 260 (1972). The plea itself is

"an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case" Menna v. New York, 423 U.S. 61, 62-3; n.2 (1975)

The plea therefore serves as a "break in the chain of events which has preceded it in the criminal process." Tollett v. Henderson, 411 U.S. 258, 267 (1973). Once a defendant has admitted his guilt in open court

"he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Tollett v. Henderson, 411 U.S. 258, 267 (1973)

When the defendant raises such claims in a federal habeas corpus proceeding, the focus of the inquiry is the validity of the plea. Of course, violations of constitutional rights, assuming they exist, may have a bearing on the guilty plea, but constitutional deprivations "are not themselves independent grounds for federal collateral relief." Tollett v. Henderson, supra at 267. See also Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970); and Brady v. United States, 397 U.S. 742 (1970).

Accordingly, the Supreme Court explained that in Parker, McMann and Brady, it had not decided the merits of the alleged pre-guilty plea constitutional violations, but had concluded that

"The issue was not the merits of these constitutional claims as such, but rather whether the guilty plea had been made intelligently and voluntarily with the advice of competent counsel." Tollett, supra at 265

Here, the alleged constitutional violation concerns the prosecutor's failure to disclose certain evidence to the defense prior to the guilty plea. First, "a state prisoner must, of course, prove that some constitutional infirmity occurred in the proceedings." Tollett v. Henderson, supra at 266. Assuming, arguendo, that the failure to disclose constituted such an infirmity, the issue, as the District Court correctly stated, is "whether or not the District Attorney's failure to disclose to petitioner that the damaging evidence (i.e., the dynamite) had previously been destroyed renders petitioner's subsequent guilty plea constitutionally invalid under the standards which require that a guilty plea be entered in a voluntary, knowing, and intelligent manner." (JA10-11).

The undisclosed information concerned one of the two charges facing the petitioner. The tment charged petitioner with separate counts of ing an explosive substance, to wit, a stick of dynamite, first on November 29, 1970 and then again on December 1, 1970 (JA70). The undisclosed information was that prior to December 1 the police had removed the explosives and replaced them with sawdust. (JA39-43) As a result, the petitioner would have had a defense of factual impossibility to the second count.

The undisclosed information, however, does not exonerate the petitioner. It leaves untouched the first count, charging a B felony with a maximum sentence of twenty five (25) years (JA31). Similarly, the undisclosed information does not eliminate the second count. The petitioner could still have been convicted of attempting the substantive offense; a C felony with a maximum sentence of fifteen (15) years. (JA30-31) In sum, all the undisclosed information could do was to reduce two B felony charges with a maximum combined sentence of fifty (50) years to one B felony charge and one C felony charge with a maximum combined sentence of forty (40) years.

It is this undisclosed information which petitioner claims renders his plea involuntary. The standard of

voluntariness is whether the plea was "induced by . . . misrepresentation" Brady supra at 755. Thus, the alleged misrepresentation was that the sawdust was still dynamite and that the petitioner therefore faced a possible fifty years of prison instead of only forty must have induced petitioner to plead guilty.

The absurdity of this claim is demonstrated by the fact that the court, petitioner, and prosecutor had agreed on a maximum sentence of five years prior to the plea. Perhaps the petitioner would have received a stiffer sentence if he had gone to trial and been convicted. But clearly a sentence after trial would not have even approached forty years. As a practical matter, the petitioner was facing the same maximum sentence after trial regardless of whether the legally possible maximum was 8 times what he actually received or 10 times what he actually received. To the extent petitioner pled guilty due to a concern that he would have received a longer sentence than five years if he had proceeded to trial and been convicted, that concern remains unchanged when the theoretically possible maximum sentence is reduced from fifty to forty years. Accordingly, the alleged misrepresentation did not induce the plea.

It should also be noted, that, as the District Court pointed out, the petitioner by his plea, avoided the possibility of a more severe sentence at trial and still had multiple charges reduced to a single, lesser degree, felony. (JA32) He also received the exact sentence, five (5) years, for which he bargained. (JA31-32)

The District Court apparently characterized this two step process of first deciding whether there was a prior constitutional violation and then deciding whether that violation affected the plea in terms of error and harmless error. His conclusion was clear and correct: the plea was voluntary and intelligent. (JA32-33).

POINT II

THE PROSECUTOR HAD NO DUTY TO
DISCLOSE INFORMATION WHICH DID
NOT RAISE A REASONABLE DOUBT AS
TO GUILT.

It is not suggested that the prosecutor does not have a duty to disclose exculpatory material to the defense. Rather, the question is "what standard of materiality gives rise to that duty?" United States v. Agurs, 427 U.S. 97, 107 (1976).

In Agurs, supra at 112, the Court explained that "the proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt." Accordingly,

"if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. . . .If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." Agurs, supra at 112-113

It is not enough to suggest that the undisclosed evidence might be of value, rather, it must, based on the entire record, create a reasonable doubt. Absent that importance the prosecutor has no duty to disclose and his failure to disclose is not error.

Thus, the issue is whether the undisclosed information creates a reasonable doubt as to the petitioner's guilt. As already noted, the most that the information could have done is reduce the two B felonies to one B felony and one C felony. The petitioner pled guilty to a single, lesser included offense. There is no support in the undisclosed information for the proposition that the petitioner is innocent of that charge. Indeed, as the District Court pointed out,

"By relying on the Bufalino trial testimony of Sergeant Stevenson that dynamite was removed from the contested tube on November 29, 1970, petitioner, at least by implication, acknowledges that dynamite was in fact in the contested tube on November 29, 1970 and before that date" (JA29).

Accordingly the prosecutor was under no duty to disclose the information and committed no constitutional error when he failed to do so.

Petitioner concludes his brief with an attack on the prosecutor's conduct. It should be noted that the prosecutor's moral culpability is not at issue. As the Supreme Court noted

"If the suppression of evidence results in constitutional error it is because of the character of the evidence not the character of the prosecutor. Agurs, supra at 110.

One need not condone the conduct of the prosecutor to find that the petitioner was not injured by the failure to disclose.

CONCLUSION

THE DISTRICT COURT'S DECISION
SHOULD BE UPHELD AND THE PETITION
FOR A WRIT OF HABEAS CORPUS
DISMISSED.

Dated: New York, New York
October 12, 1977

Respectfully submitted,

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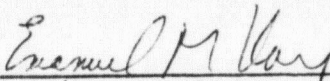
STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MARILYN LISI , being duly sworn, deposes and
says that s he is employed in the office of the Attorney
General of the State of New York, attorney for Appellee
herein. On the 12th day of October , 1977 ,s he served
the annexed upon the following named person :

Philip B. Abramowitz, Esq.
2600 Main Place Tower
Buffalo, New York 14202

Attorney in the within entitled proceeding by depositing
³ copies
a true and correct ~~copy~~ thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Sworn to before me this
12th day of October , 1977


Assistant Attorney General
of the State of New York

